

Cai (Migration) [2023] AATA 2039 (22 June 2023)

CORRIGENDUM

DIVISION: Migration & Refugee Division

APPLICANT: Mr Zhixin Cai

REPRESENTATIVE: Mr Simon Shijie Feng (MARN: 0741653)

CASE NUMBER: 2205999

HOME AFFAIRS REFERENCE(S): BCC2021/337590

MEMBER: Wendy Banfield

DATE OF DECISION: 22 June 2023

**DATE CORRIGENDUM
SIGNED:** 7 July 2023

PLACE OF DECISION: Canberra

AMENDMENT: The following corrections are made to the
decision:

- 1.
2. The decision incorrectly denoted the date of decision as 22 May 2023. The decision is corrected to state that it was made on 22 June 2023.
- 3.

Wendy Banfield, Member



Administrative Appeals Tribunal

4.

DECISION RECORD

DIVISION: Migration & Refugee Division

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REPRESENTATIVE: Mr Simon Shijie Feng (MARN: 0741653)

CASE NUMBER: 2205999

HOME AFFAIRS REFERENCE(S): BCC2021/337590

MEMBER: Wendy Banfield

DATE: 22 May 2023

PLACE OF DECISION: Canberra

DECISION: The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

I, Member Wendy Banfield, certify that this is the
Tribunal's statement of decision and reasons



Statement made on 22 June 2023 at 11:41am

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – bogus document – student ID number – allegations against education agent – compassionate or compelling circumstances – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5(1), 65
Migration Regulations 1994, Schedule 2 cl 500.217; Schedule 4, Public Interest Criterion 4020; r 1.03

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 12 April 2022 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
6. The applicant applied for the visa on 8 March 2021. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 500.217(1) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because there was evidence before the Minister that the applicant provided, or caused to be provided, a bogus document or false or misleading information in relation to the visa application.
7. The applicant appeared before the Tribunal on 17 May 2023 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
8. The applicant was represented in relation to the review. The representative attended the Tribunal hearing.
9. The following submissions were provided to the Tribunal:
 - Department of Home Affairs (the Department) notification and decision record dated 12 April 2022.
 - Applicant's written statement dated 15 April 2022.
 - Confirmation of Enrolment Certificates for an Advanced Diploma of Marketing and Communications and a Graduate Diploma of Management (Learning).
 - Applicant's response to the Department's natural justice letter dated 31 July 2021.
10. The Tribunal also considered relevant evidence provided to the Department, and the applicant's arguments and submissions to the Tribunal at the hearing.
11. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 500.217(1) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or

refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

13. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

14. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
15. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
16. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
17. The Department wrote to the applicant on 19 July 2021 inviting him to comment on the following information:

18. *You were initially granted a Student Vocational Sector (subclass 500) visa granted on 18 June 2018 and ceased to be in effect on 10 March 2021. On 8 March 2021, you lodged another Student Vocational Sector (subclass 500) visa application.*

19. *You have given in relation to your previous student visa application, a translated copy of an Identity Card of P.R China indicating Cai Zhixin with date of birth 25 April 1994 has an ID Card No 350203199404253698 issued by Xiamen City Public Sector Siming Branch. This ID card is valid from 20 August 2013 to 20 August 2023.*

20. *On 10 June 2021, a departmental officer contacted the relevant institution to verify the document you have submitted to the department in support of your previous student visa which you have held in the period of 12 months before your current student*

visa application was made. During the verification process, it was found ID Card No 350203199404253698 does not exist.

21. The outcome of the departmental investigations raises concerns you may have provided a bogus document and misleading and false information in a material in particular in support of previous your visa held in the period of 12 months before your current student application.

22. The applicant replied to the invitation on 31 July 2021. In his response, the applicant claimed an education agent visited his village offering his services. He claimed the agent was given all the information for a student visa application, including the applicant's ID card. The applicant agreed the ID number on his original visa application was different to the one declared in a later application and that the case officer had found the fake one did not exist. The applicant said he believed the agent had changed ID card issuing office because an applicant from a big city was more likely to be granted a student visa. He declared neither he nor his family asked the agent to make any illegal change. According to the applicant, his father tried to contact the agent when they were made aware of the issue but was informed he had passed away. The applicant said he did not knowingly provide an ID with a changed issuing office and number. He asked that his family's lack of English and the fact he did not agree for the agent to provide information that had been changed be considered. The applicant advised all his other information was correct and he has a good educational history in Australia.
23. In his submission to the Tribunal the applicant declared he had provided a detailed explanation to the Department about the bogus document he is suspected of providing. The applicant advised: he "unknowingly made a mistake" and that he and his family are the victims of a corrupt agent; he accepts he should be punished but there is widespread corruption in China, especially in the countryside; he should be given an opportunity to correct the wrongdoing; he has been attending school and studying well; and he has told the truth and regrets the mistake.
24. At the Tribunal hearing the applicant gave a consistent account of what he said occurred that led to a bogus identity card being submitted with his student visa application. He said an agent came to his village promoting overseas study and travel and the applicant's father was interested. They submitted the applicant's documents to the agent who advised he would be responsible for the application. The applicant said he had not been aware of the bogus document until notified by the Department. The applicant suggested the agent may have thought there would be a better chance if it appeared the applicant came from a bigger city. He said his father tried to contact the agent but was informed he had passed away and no one else knew about the matter.

25. *Assessment*

26. The Tribunal reviewed the Department's findings and considered the applicant's submissions and evidence. The applicant denied all knowledge of a bogus document having been submitted in relation to a visa application. He agreed the information on the ID card submitted in his original student visa application was different from that provided with the application which is the subject of this review but claimed he was not aware of and did not ask his then agent to make any fraudulent changes. The applicant speculated that the agent may have submitted a non-genuine document because an applicant from a larger city may be more likely to succeed. The Tribunal is satisfied the Department had established the ID details provided with the applicant's original visa application was not genuine.
27. The Tribunal is not satisfied the applicant's claims of an education agent being at fault and his family's poor language abilities absolve the applicant of the responsibility to ensure his

visa applications are true and accurate. It is not sufficient for an applicant to provide documents to an agent and accept their assurances that they will be responsible for the content of the application. It indicates an indifference as to how the agent will secure a favourable visa outcome for the applicant. The requirement not to provide a bogus document or false or misleading information applies whether or not the document or information was provided by the applicant knowingly or unwittingly. For these reasons, the Tribunal concludes there is evidence the applicant has given, or caused to be given, to the Minister, a 'bogus document' as defined in s 5(1), that is, a document that the Tribunal reasonably suspects is counterfeit or has been altered by a person who does not have authority to do so whether or not made knowingly in relation to the visa application.

28. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

29. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
30. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
31. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
32. The applicant made claims to the Department and the Tribunal about his own circumstances including his current studies. The applicant did not make any claims that address whether there are compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen that justify the granting of the visa in his case.
33. Therefore, the requirements of PIC 4020(1) should not be waived.
34. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 500.217(1).
35. There is no evidence the applicant meets the criteria for any other subclass within the class of visa.

DECISION

36. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Wendy Banfield
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...